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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

SOMKHOUANE NICK VIGNARATH,

Defendant and Appellant.

D054615

(Super. Ct. No. SCD214458)

APPEAL from a judgment of the Superior Court of San Diego County, Charles G. Rogers, Judge. Affirmed.

A jury found Somkhoulane Nick Vignarath guilty of receiving a stolen vehicle (Pen. Code, § 496d).¹ The court found true allegations that Vignarath had a prior vehicle theft conviction (Veh. Code, § 10851; § 666.5, subd. (a)) and had served a prior prison term (§ 667.5, subd. (b)) for that conviction. The court sentenced Vignarath to four years

¹ Further statutory references are to the Penal Code unless otherwise specified.

in prison: the three-year middle term for receiving a stolen vehicle with a prior vehicle theft conviction, and one year for the prison prior. Vignarath appeals. We affirm.

BACKGROUND

On the night of June 23, 2008, Hillary Smith parked her Honda Accord outside her home. The next morning it was gone. She reported the theft to the police. Two days later, San Diego Police Detectives Timothy Coyle and John Smith saw the stolen Accord at an apartment complex. Vignarath was walking away from the Accord. Detective Smith detained Vignarath. Vignarath had tools, wire cutters, and wires in his possession.

Detective Coyle and a patrol officer found Dan Van Tran under the Accord with tools. The Accord's front seat was unbolted and loose, speaker covers were missing, the exhaust system was partially disassembled, and the muffler and exhaust pipe were on the ground. Tran had shaved keys and "jiggle keys" in his possession.

At the police station, Vignarath waived his *Miranda* rights (*Miranda v. Arizona* (1966) 384 U.S. 436). Vignarath told Detective Coyle that he and his girlfriend, Lillian, had driven his car to the apartment complex. He planned to rewire the car's stereo system at the complex, but Lillian had left with the car. Vignarath denied that he had been near the Accord. Detective Coyle saw grease on Vignarath's forearm. Detective Coyle asked if Vignarath had been arrested before. Vignarath said that he had been arrested for stealing an Accord.

Defense counsel moved for a mistrial based on Detective Coyle's testimony regarding Vignarath's admission of his prior arrest. Citing Evidence Code section 1101,

subdivision (b), the trial court denied the motion. The court granted Vignarath's motion for acquittal on a charge of owning and operating a chop shop (Veh. Code, § 10801).

Appointed appellate counsel has filed a brief summarizing the facts and proceedings below. Counsel presents no argument for reversal, but asks this court to review the record for error as mandated by *People v. Wende* (1979) 25 Cal.3d 436. Pursuant to *Anders v. California* (1967) 386 U.S. 738, counsel lists as possible but not arguable issues, whether the court erred by determining that Vignarath's statement to Detective Coyle concerning his prior arrest was admissible, and whether the court abused its discretion by imposing the three-year middle prison term.

We reviewed the record pursuant to *People v. Wende, supra*, 25 Cal.3d 436 and *Anders v. California, supra*, 386 U.S. 738, saw the possible issues discussed below, and requested supplemental briefing from counsel.

*There is No Reversible Error Regarding Vignarath's Waiver of the Right
To a Jury Trial on the Section 667.5, Subdivision (b) Allegation*

The information alleged, under section 667.5, subdivision (b), that Vignarath had served four prior prison terms. One of the prison priors was based on a 2005 conviction for a violation of Vehicle Code section 10851, subdivision (a) in case number SCD194190. That conviction was also the basis of a section 666.5, subdivision (a) allegation that Vignarath had suffered a prior conviction for vehicle theft. In the trial court, defense counsel stated that Vignarath would waive his right to a jury trial on the section 666.5 and section 667.5 allegations. However, when the court took the waiver, it mentioned only section 666.5. The court later asked whether Vignarath was going to

admit the section 666.5 and section 667.5 allegations. Defense counsel asked for "a future date as to that decision," and stated, "I believe we waived jury to determine the prison prior and the prior conviction." The court set a date for a trial "on the priors."

At the trial on the priors, the People introduced evidence as to all four of the alleged prior convictions and the court found all four true. The court expressly mentioned section 666.5, subdivision (a), but again did not mention section 667.5, subdivision (b) in its ruling.

This court requested supplemental briefing from the parties addressing the following questions: "1. Does the court's failure to obtain an explicit waiver from appellant of his right to a jury trial on the . . . section 667.5, subdivision (b) allegation require reversal of that enhancement? [¶] 2. What is the effect, if any, of the court's failure to mention . . . section 667.5, subdivision (b), during the court trial on the prior conviction allegations?" Both parties have filed supplemental letter briefs in response to this request.

Vignarath's counsel argues that the trial court's failure to obtain an express waiver of the right to a jury trial on the section 667.5, subdivision (b) allegation requires reversal and, if the record is deemed silent because the court failed to mention section 667.5, subdivision (b), the enhancement must be stricken. The deputy attorney general contends that any error was harmless because Vignarath was advised of, and waived, his right to a jury trial on the truth of the underlying conviction, and the court found the conviction true.

We agree with the People that neither the trial court's failure to obtain Vignarath's express waiver of his right to a jury trial on the prior prison term allegation for purposes of section 667.5, subdivision (b), nor the court's failure to mention section 667.5, subdivision (b) at the time it found that appellant had suffered the 2005 vehicle theft conviction, requires reversal.

In *People v. Wiley* (1995) 9 Cal.4th 580, the court observed that "sections 1025 and 1158 grant a defendant the right to have the jury determine only whether he or she 'suffered' the alleged prior conviction," and not, as alleged in that case, whether multiple prior convictions had been separately brought and tried. (*Id.* at p. 589.)

As noted above, in the trial court, Vignarath's counsel indicated that Vignarath would waive his right to jury trial as to both the section 666.5 allegation and the section 667.5 allegation. Vignarath proceeded to waive his right to a jury trial, but the trial court mentioned only section 666.5 in taking the waiver. However, pursuant to *People v. Wiley, supra*, 9 Cal.4th 580, in waiving his right to a jury trial as to the section 666.5 allegation, Vignarath was waiving the right to have a jury determine whether he had suffered the alleged 2005 vehicle theft conviction that underlies both the section 666.5 and section 667.5 allegations. The trial court found that Vignarath had in fact suffered this conviction. Any error in failing to obtain an explicit waiver from Vignarath as to the truth of the prior conviction allegation *for purposes of section 667.5, subdivision (b)*, or in failing to articulate that the court found the prior conviction allegation to be true for purposes of this specific statute is harmless, since the court found that Vignarath did incur the conviction that underlies both the section 666.5 allegation and the section 667.5,

subdivision (b) allegation. As the People note, Vignarath has not shown that despite having clearly waived jury trial as to the 2005 conviction for purposes of section 666.5, he would not have done so for purposes of section 667.5, subdivision (b).

*There Are No Reasonably Arguable Appellate Issues
Under People v. Wende*

We granted Vignarath permission to file a brief on his own behalf. He has not responded. Our review of the record pursuant to *People v. Wende, supra*, 25 Cal.3d 436 and *Anders v. California, supra*, 386 U.S. 738, including the possible issues listed pursuant to *Anders v. California, supra*, 386 U.S. 738, has disclosed no reasonably arguable appellate issues. Vignarath has been competently represented by counsel on this appeal.

DISPOSITION

The judgment is affirmed.

AARON, J.

WE CONCUR:

HUFFMAN, Acting P. J.

McDONALD, J.